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IN THE

Supreme Court of the United States

OCTOBER 1970 TERM

No. 418

H. H. ROBERTSON CO., and LIBERTY MUTUAL INSURANCE CO.,
Appellants,

vs.

KENNETH NEWBERRY, Guardian of Larry Newberry,
Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The arguments presented to support the position that there is no substantial federal question are fallible. We wish here to oppose these arguments by argument organized in the order of arguments presented in Appellee's Motion to Dismiss or Affirm.

I.

A. The rights and duties of the Michigan Workmen's Compensation Act are based upon Contract.

The case cited in the Jurisdictional Statement as being dispositive of the issue of whether Michigan workmen's compensation rights and obligations are based upon contract, *Dettloff v. Hammond Standish & Co.*, 195 Mich. 117, does not stand alone like an old sentinal to a forgotten army. The proposition for which it was cited has been followed in numerous cases in addition to the one instance related by Appellee.

Crane v. Leonard, Crossette and Riley, 214 Mich. 218; *Wood v. Vroman,* 215 Mich. 449; *Boshaw v. J. J. Newberry Co.,* 259 Mich. 333; *Roberts v. I X L Glass Co.,* 259 Mich. 644 and *Thomas v. Parker Rust Proof Co.,* 284 Mich. 260 are some of the cases in addition to *Detloff v. Hammond Standish & Co., supra,* and *Fritz v. Rudy Furnace Company,* 218 Mich. 324 that have recognized the principle that rights and obligations dealing with Michigan workmen's compensation benefits are based on contract. As recently as November, 1967 in *Fox v. Employment Security Commission.* 379 Mich. 579, the Michigan Supreme Court recognized the applicability of argument that workmen's compensation rights and liabilities are based on contract, although decision was based on other grounds:

> "Plaintiff further contends that his right to workmen's compensation benefits vested as of the date of injury in 1955, and that therefore (a) he is deprived of property without due process of law, and (b) there is an impairment of the obligations of contract when the legislature attempts to affect this vested right by providing that he must give up the same amount of unemployment compensation bene-

fits to which he would otherwise be entitled." *Fox v. Employment Security Commission, supra,* at p. 586.

The provisions of the Michigan Workmen's Compensation Act which make it applicable to employers and employees makes it so because each has a contract of hire arrangement with the other. MCLA §§ 411.5, 411.7, 1970 Cumulative Pocket Part §§ 418.151(b), 418.161(a). The Michigan Supreme Court has consistently recognized that the rights and obligations determined by the Workmen's Compensation Act are based upon the contract between the employer and employee.

Crilly v. Ballou, 353 Mich. 303, does not relate to the issue of whether the rights and obligations of workmen's compensation are based on contract. The issue there, as it was in *Cudahy Packing Company of Nebraska v. Parramore,* 263 U.S. 418, dealt with how a provision of a workmen's compensation act should be interpreted. The provision was "arises out of and in the course of employment" in *Crilly* and "arises out of or in the course of his employment" in *Parramore.* Simply put, the Court in each case was determining how a provision of the statute that was a part of the employment contract should be interpreted; by prior standard used in negligence or agency cases, or by a new standard more appropriate to the purposes of workmen's compensation. Each case determined that the statutory phrase which determines applicability of the workmen's compensation act should not be determined by the same standards as "scope of employment" was determined in applying the doctrine of *"respondeat superior"* to negligence and agency cases.

Michigan, by its Workmen's Compensation Act as applied by the Supreme Court of Michigan, has determined

to provide workmen's compensation benefits by making the legislation a part of the employment contract. The quotation from *Crilly v. Ballou, supra,* because it is taken out of context, does not change the long recognized principle that Michigan workmen's compensation rights and obligations have their base in the employment contract.

The majority of the Michigan Supreme Court, in *Lahti v. Fosterling,* 357 Mich. 578, operated under a misconception that the power of the legislature was total and complete. This is indicated by a total absence of any mention of limitation upon the police power of the state and the statement that rights created by exercise of the police power "sprang from the kindness and grace of the legislature." *Lahti v. Fosterling, supra,* at pp. 588-589. This misconception demonstrates a failure to recognize certain fundamental limitations upon a legislature that are inherent in a constitutional government; limitations that are spelled out in Article I, Section 10 and Amendment XIV of the Constitution of the United States.

When a constitution guarantees certain limits upon unfettered legislative power, there are bound to be conflicts as to whether certain legislative acts infringe upon constitutional guarantees. When a state Court of last resort has concluded that the legislature has made retroactive a provision which is a part of an employment contract and that provision has changed the employer's contract obligation from one that is discharged to one that has no limit, but will exceed $110,000.00 if limited by a normal life expectancy and hospital rates in effect in 1966 ($8.45 per day) the issues raised are not so inconsequential as to be dismissed by stating, "exercise of the police power".

Citation of, and quotation from *Douglas County v. Industrial Commission,* 275 Wis. 309 is another attempt to

take the instant case out of its proper frame of reference by taking a quotation out of context. The unquestioned holding in the *Douglas County* case was that a state could legislate retroactively so as to change a contract to which a subdivision of a state was a party if the other party to the contract agreed to the change. This, implicitly, accepts that as between a private employer and his employees, Wisconsin recognizes, as do all other states but New York that have decided the issue, workmen's compensation rights and obligations are based upon contract and are subject to impairment of contract constitutional limitations.

We, by no means, contend that legislative change can be "headed off" by making a contract. We do contend that retroactive legislative change regarding rights and obligations based on contract raise substantial constitutional questions dealing with impairment of contract and due process of law. When, as a part of the employment contract, medical benefits are specifically limited by statute to four 6 month periods, and after these benefits have been exhausted it is held that these specifically limited benefits have been changed so that there is no limit to an employee's right and no limit to an employer's obligation for medical benefits, as is demonstrated by the record in this case, we believe that the contract provision impaired is demonstrated with sufficient specificity.

B. The changes made enlarging rights and obligations for medical benefits for injured workmen by the Michigan Legislature by PA 1955, No. 250 were substantive and not remedial.

When workmen's compensation legislation was first enacted in Michigan by PA 1st Extra Session of 1912, No. 10, there is no one who would question that the provisions contained in the enactment granting weekly benefits and medical benefits were substantive rather than procedural provisions. Any reasoning that concludes that changes in these benefits since that time are not substantive but relate to the remedy is so grossly unsound as to be less than sophistry.

The provisions of PA 1955, No. 250 here in question did nothing regarding how benefits were to be awarded or received; did nothing to enlarge or shorten the time within which the benefits could be sought, and did nothing relating to the tribunal created to administer the rights and obligations of the Workmen's Compensation Act. There are instances when distinguishing between substance and procedure is difficult, for a right without a remedy is of no more benefit than no right at all, but, that difficulty is not present here. PA 1955, No. 250 changed the substance of medical benefits but did nothing as to how the substance was to be obtained.

The Michigan Supreme Court, In *Lahti v. Fosterling, supra,* enlarged the definition of remedy to make it so big as to include both substance and precedure, and then applied a rule intended to be applied only to procedure. When this is done to evade the applicability of constitutional limitations of impairment of contract and due process of law, constitutional questions of serious consequence are raised.

C. Comparing the Determinations of this Court in the *Blaisdell* and *City of El Paso* cases with the instant case is helpful and establishes that this case raises substantial constitutional questions.

We do not question that there are instances when substantive contractual rights may be interfered with by legislation when the circumstances are that a *vital* interest of the people establishes the need. The vital interest of the people in the *Blaisdell* and *City of El Paso* cases is obvious and obviously vital. The maintenance of stability in land purchases and the prevention of large numbers of equitable forfeitures brought about by the greatest economic panic in this nation's history was the obvious vital interest served by the legislation in *Blaisdell.* The necessity of barring stale claims to large and important areas of land was the obvious vital interest served in *City of El Paso.*

Prior to adoption of PA 1955, No. 250 the Michigan Workmen's Compensation Act had been amended forty-eight times. Thirteen of these amending acts enlarged benefits and medical benefits were enlarged four times. None of the prior acts making substantive changes in the rights and obligations of employers and employees was retroactive, and several were much more comprehensive than the amendment in issue, PA 1937, No. 61, bringing occupational disease within the protection of the act, being an example. It must be concluded that in these amendments there was no interest so vital to the people that retroactive effect and impairment of contract was necessary. There is nothing apparent that makes the forty-ninth amendment any different than its predecessors.

There is nothing comparable between the vital interest of the people in having some stability in land purchases protected from the effects of the nation's greatest economic

calamity, and the instant case. Equally, there is no comparison between the instant case and the basic necessity of barring stale claims to large and important areas of land. The *Blaisdell* and *City of El Paso* cases are not supportive of the determinations in this case. The basis of decision in the *Blaisdell* and *City of El Paso* cases—extra-ordinary, vital interests of the people requiring limited interference with contract rights—is not in harmony with the determinations in this case. Because it is not, this case raises substantial constitutional questions.

II.

Police power legislation that regulates insurance premiums, and then after they are set and collected adds to the risk that was contemplated when the rates were approved, and requires payment of the loss of the retroactively added risk is arbitrary and unreasonable and violates due process of law.

There are fundamental differences between the situations in *Nebbia v. New York*, 291 US 502 and *Williams v. Lee Optical of Oklahoma*, 348 US 483 and the situation here. The legislation in the *Nebbia* and *Williams* cases regulated how property could be *used* in commerce. Although the use of property was limited, it was not taken. Nebbia could sell his milk, he was required to sell it at no less than nine or ten cents a quart depending upon the character of the sale. Lee Optical could dispense lenses, but it could be done only by prescription of an optometrist or ophthalmologist. Nothing was entirely taken from Nebbia or Lee Optical and given to someone else after all the elements of a transaction were fixed.

It is to be hoped that the day is not yet gone when the Supreme Court of the United States determines that it is

contrary to basic elements of fairness, due process of law, for a state legislature to spell out the rights and obligations of parties, and then substantially later, after all of the elements of determining the rights and duties have been set, and the time for preparing for the obligations has passed, enlarge the rights and the duties infinitely and demand and enforce payment.

Legislation that is fair in the regulation of the use of property does not determine that the taking of wealth and redistributing it, after the elements determining where the wealth should be are fixed, is fair. Whether a taking and redistribution of wealth under the circumstances of this case is fair, or can be fair, within the limits of due process, is not determined by the *Nebbia* or *Williams* cases. The same principle that determined Florida legislation to be contrary to due process of law in *Forbes Boat Line v. Board of Commissioners*, 258 US 338 makes the issue of this case, at least, a substantial issue of constitutional law.

There is an analogy between the *Nebbia* and *Williams* cases and this case for the state has legislated as to how premium rates for workmen's compensation liability insurance policies are to be regulated.

> "Sec. 2400. The purpose of this chapter is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to authorize and regulate co-operative action among insurers in rate making and in other matters within the scope of the insurance code. Nothing in the chapter is intended (1) to prohibit or discourage reasonable competition, or (2) to prohibit, or encourage except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or prac-

tices. This chapter shall be liberally interpreted to carry into effect the provisions of this section."

MCLA §500.2400.

"Sec. 2403. (1) All rates shall be made in accordance with the following provisions:

(a) Due consideration shall be given to past and prospective loss experience within and outside this state, to catastrophe hazards, if any, to a reasonable margin for underwriting profit and contingencies, to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers, to past and prospective expenses both countrywide and those specially applicable to this state, to underwriting practice, judgment, and to all other relevant factors within and outside this state;

(b) The systems of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the requirements of the operating methods of any such insurer or group with respect to any kind of insurance, or with respect to any subdivision or combination thereof for which subdivision or combination separate expense provisions are applicable;

(c) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which measure variations in hazards or expense provisions, or both. Such rating plans may measure any differences among risks that may have a probable effect upon losses or expenses as provided for in subdivision (a) of subsection (1) of this section;

(d) Rates shall not be excessive, inadequate or unfairly discriminatory.

(2) Except to the extent necessary to meet the provisions of subdivision (d) of subsection (1) of this section, uniformity among insurers in any matters within the scope of this section is neither required nor prohibited."

MCLA §500.2403

"Sec 2406. (1) **Filings by insurer on its own behalf.** Every insurer shall file with the commissioner every manual of classifications, every manual of rules and rates, every rating plan and every modification of any of the foregoing which it proposes to use. Every such filing shall state the proposed effective date thereof, and shall indicate the character and extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports such filing, and the commissioner does not have sufficient information to determine whether such filing meets the requirements of this chapter, he shall within 10 days of such filing give written notice to such insurer to furnish the information upon which it supports such filing. The information furnished in support of a filing may include (a) the experience or judgment of the insurer or rating organization making the filing, (b) its interpretation of any statistical data it relies upon, (c) the experience of other insurers or rating organizations, or (d) any other relevant factors. A filing and any supporting information shall be open to public inspection after the filing becomes effective.

"(2) **Filings by licensed rating organization.** An insurer may satisfy its obligation to make such filings by becoming a member of, or a subscriber to, a licensed rating organization which makes such filings, and by authorizing the commissioner to accept such filings on its behalf: Provided, That

nothing contained in this chapter shall be construed as requiring any insurer to become a member of or a subscriber to any rating organization."

MCLA §500.2406

"Sec. 2412. No insurer shall make or issue a contract or policy except in accordance with filings which are in effect for said insurer as provided in this chapter or in accordance with sections 2410 or 2414."

MCLA §500.2412

Pursuant to these statutes all insurers of workmen's compensation liability have their rates determined by the Insurance Commissioner by using the services of the Michigan Workmen's Compensation Rating Bureau. The method used by the Bureau and approved by the Insurance Commissioner is the same method used in all but a few of the states that allow workmen's compensation liability to be insured. The method of calculating premiums is complex, but a lucid explanation of the theory and practice of this rate making can be found in Heitzmann, *Workmen's Compensation Manual Rate Making,* Annals of the Society of Chartered Property and Casualty Underwriters, Vol. 17, Edition 3, pp. 197-212, Fall 1964.

Basic to this rate making is the use of past experience which is used to forecast losses for the following year. Past experience includes not only losses paid, but losses that will be paid in the future because of injuries that occurred in the experience period. Premium rate is then calculated by assuming that losses as forecast above will occur in the coming year, and then making the premium sufficient to pay these losses and the expenses related to them. Rates are revised annually. No attempt is made to recapture underwriting losses or repay underwriting gains, for by making

annual revisions it is believed that premiums will be kept responsive to losses. See *Heitzmann, supra* at p. 199.

Thus, the premium paid by Appellant Robertson to Appellant Liberty Mutual in 1951 was calculated to pay losses that occurred because of injuries that occurred in that year, and as a retroactive change in benefits could not be contemplated, nothing was put into the premium calculation for the loss which Michigan tribunals have directed the Appellants must pay.

The unfair result that retroactive legislation can have on this type of rate making structure is apparent. In 1959, the Michigan Supreme Court concluded that the 1955 substantive amendment was retroactive, and that for all injuries that had occurred prior to the amendment the employees were entitled to unlimited medical benefits. The method of calculating rates, approved by the Insurance Commissioner in accordance to the statutes as being reasonable, could not take the losses, made losses for the first time by the decision in *Lahti v. Fosterling, supra,* into account in calculating premium, but insurers are obliged to pay them nonetheless.

The end result is that the state, by the exercise of the police power, regulates the premium rate to be charged and determines it to be reasonable for the risk taken and then subsequently, after reasonable premiums are collected, determines that the risk is larger than was allowed to be considered when the premium was approved. We contend that retroactively adding to the risk, once reasonable premium for a lesser risk is determined, cannot be condoned merely by saying that the retroactive legislation was a reasonable exercise of the police power, for if the premium was determined reasonable for 1951 injuries in 1951, adding substantially to the 1951 risk in 1955 or

1959 necessarily makes paying claims on risks not contemplated in 1951, unfair and unreasonable. At the very least, such a set of circumstances raises substantial constitutional questions.

The *Nebbia* and *Williams* cases certainly allow for the reasonable regulation of premium rates for workmen's compensation liability insurance. It is quite another thing to have regulation of premium rates and the determination of a fair rate, and then after the rate is determined and paid, have the state enlarge the risk upon which premium rate was calculated.

There is no indication in this record that the burden of charges for the confinement of Larry Newberry are now on the shoulders of the guardian of Larry Newberry. The records of Wayne County, Michigan, Probate Court, Case Number 528-096 shows that Larry Newberry is confined and expenses of confinement are charged to the public.

Considering the circumstances revealed in the record, confinement after attempting to attack his father and police officers with a butcher knife, the possibility of any of Larry Newberry's family ever being held liable for the cost of confinement is remote. See *Department of Mental Hygiene v. Kirchner,* 388 P2d 720, 380 US 194, 400 P2d 321.

The foregoing demonstrates that the basis for use of the pious sounding phrase "more equitable distribution of the economic burden" here—a windfall for the insurance company, and large expenses placed on the brother of Larry Newberry—is absent.

CONCLUSION

Michigan workmen's compensation rights and obligations are based upon the contract of employment and, thus, are subject to the constitutional protections afforded by Article I, Section 10 of the Constitution of the United States.

While the protections given by Article I, Section 10 are not absolute, cases which have allowed impairment of contract have done so only if vital interests of the people made it necessary, and then allowed limited and temporary changes.

Examination of the factors in this case show that there is no analogy between the interests determined vital in the cases allowing limited and temporary impairment, as the amendment here was the forty-ninth in a period of thirty-three years, and none of the predecessors, although some were broader in scope, were found necessary to impair contract rights.

The impairment here cannot be classified as limited or temporary. The change made the new rights and new obligations for medical benefits unlimited, both as to amount and to persons who would be entitled to benefits, and permanent.

There are substantial questions for the review of this Court when the limits to the police power regarding impairment of contract, —limited, temporary impairment to protect the vital interest of the people—have been ignored.

Retroactive legislation, by its nature raises questions of fairness. The use of the phrases "more equitable distrubution of the economic burden", "the private right must yield to the public need", "the humanitarian purposes of

workmen's compensation" and "exercise of the police power" does nothing in defining limits to the state's police power, although in constitutional government there must be limits.

When what an insurer of workmen's compensation liability can charge for the protections afforded is subject to police power regulation, and after application of these regulations has produced a rate that was determined by the state to be fair, retroactively adding to the risk by inclusion of an unlimited right to medical benefits raises substantial questions of fairness.

Cases applying the concept of due process of law to legislation which regulates the use of property do not determine cases where the use of property was first regulated and then was taken.

When legislative changes are substantive, and there can be no question that here they are substantive, and a Court accepts a definition of "remedial," so broad as to include both substance and procedure, and then applies a rule applicable only to procedure, and in doing this avoids consideration of due process of law limitations, substantial issues of constitutional law are raised.

Wherefore, Appellants pray that Appellee's Motion to Dismiss or Affirm be denied, and that probable jurisdiction be noted, the case be accepted for oral argument and the decision below reversed.

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